



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 74 OF 2011

BAHATI SHEE MWAFUNDIAPPELLANT

VERSUS

ELIJAH WAMBUA.....RESPONDENT

RULING ON NOTICE OF MOTION DATED 18TH APRIL, 2013

1. The Notice of Motion dated 18th April 2013 is filed by the BAHATISCHEE MWAFUNDI, the appellant herein. By that application appellant seeks the following order:

“That the Notice of withdrawal of Appeal dated 17.6.2011 and filed on 22.6.2011 be withdrawn and the memorandum of Appeal dated 3.5.2011 be reinstated”.

BACK GROUND

2. The appellant filed a case before Senior Resident Magistrate’s court at Kwale being Civil case No. 276 of 2010. The appellant sought by that case damages from the respondent Elijah Wambua alias Elija Musembi Wambua for injuries suffered in a road traffic accident.

3. On 7th October 2012 the Kwale court entered an interlocutory judgment against the respondent in default of appearance and defence.

The Kwale case proceeded on formal proof on 1st December 2010 on 13th April 2011 the Kwale court dismissed appellant’s suit. Appellant filed this present appeal against that judgment.

4. By Notice of withdrawal dated 17th June and filed on 22nd June 2011 appellant withdrew this appeal.

5. From the various affidavits I have seen that the appellant’s counsel and the respondent’s counsel entered into a consent dated 27th April 2011 and filed in Kwale court on 16th May 2011. The consent was in the following terms:

“We shall be most obliged if your honour kindly recorded the following consent order;

“By consent of both parties herein, the interlocutory judgment entered in favour of the plaintiff as against the defendant be and is hereby set aside.

The defendant do pay to the plaintiff thrown away costs of Ksh 5,000 within thirty (30) days from the date of filing of this consent.

By further consent, defendant be and is hereby granted leave to file its written statement of defence within fourteen (14) days from the date of filing of this consent order.”

Yours very obedient servants,

P A OSINO & COMPANY

ADVOCATES FOR PLAINTIFF

MENEZES, OLOO & CHATUR

ADVOCATE FOR THE DEFENDANT “

6. It is important to note that that consent was entered and filed after the appellant's (the plaintiff in the Kwale court) suit had been dismissed on 13th April 2011 on the ground that appellant had failed to prove her case.

7. It does seem that after the respondent's learned counsel discovered that they had entered a consent in a suit that had been dismissed, they sought to set aside the consent by their Notice of Motion dated 20th March 2012 filed before the Kwale court. That consent was set aside by the Kwale court by its undated Ruling.

APPELLANT'S SUBMISSIONS.

8. Appellant relied on her affidavit dated 18th March 2013 which lacking in substance and to show that is so, I reproduce it as follows:

“ 1. That I am the plaintiff herein hence competent to swear this affidavit.

2. That appeal was filed I (sic) court on 3.5.2011 and Notice to withdraw this suit filed on 22.6.2011.

3. That this was pursuant to consent filed in KWALE SRMCC NO. 276 of 2010 setting aside the interlocutory judgment on 16.5.2011.

4. That on the 22.5.2012 the respondent advocate applied to set aside the consent order and their application was allowed on 31.10.2012.

5. That the applicant opposed the said application and filed a replying affidavit and further affidavit.

6. That the applicant being dissatisfied with the said decision lodged an appeal which is pending.

7. That in view of the above developments the applicant wishes to have the appeal reinstated as the same is meritorious since her case was dismissed on liability when it comes (sic) for normal (sic) proof yet the issue of liability was foreclosed.

8. That the said application shall not cause any prejudice to the Respondent.

9. That I annex the following documents marked in a bundle as annexure 'A'

(i) Letter dated 27.4.2011 and filed in court on 16.5.2011.

(ii) Notice of Motion filed on 22.3.2012

(iii) Replying Affidavit filed on 15.6.2012

(iv) Further affidavit

(v) Further affidavit

(vi) Memorandum of appeal

10. That I swear this affidavit in support of my application.”

9. Appellant annexed as stated in paragraph 9 above, various documents relating to the proceedings before Kwale court. Of importance to note is that the application by the respondent to set aside the consent, before Kwale court, on the ground that the consent was filed after the appellant's case before Kwale court was dismissed after the formal proof. Respondent argued before Kwale court that the consent had been entered into through appellant's counsel's concealment that appellant's suit had been dismissed.

RESPONDENT'S SUBMISSIONS

10. After setting out the background of this matter, as discussed above, respondent submitted that the law did not permit a party who has unilaterally withdrawn a suit to seek its reinstatement.

COURT'S ANALYSIS

11. I have considered the appellants' application. The notice to withdraw this appeal was filed under the provisions of Order 25 of the Civil Procedure Rules. As rightly submitted by the respondent there is no provision under that order for withdraw of the notice to withdraw an appeal. Order 25 envisages that once a party withdraws or discontinues a suit such a party may file another suit and such withdrawal or discontinuation cannot be raised as a defence in a subsequent suit.

12. Under Order 25 once a suit is withdrawn or discontinued the court shall enter judgment for costs against the plaintiff.

13. It follows that order 25 does not permit a party to withdraw a notice to withdraw or discontinue a suit. The filing of such a notice to withdraw or discontinue a suit terminates the suit and there cannot be, thereafter, a setting aside of the notice to withdraw or discontinue a suit. The following is what the learned author Stuart Sime in the book "A Practical Approach to Civil Procedure" 9th edition stated:

“Notice of discontinuance takes effect and brings the proceedings to an end as against each defendant, on the date it is served upon the defendant.”

In this case the respondent had notice of the withdrawal or discontinuous of this appeal before seeking to set aside the consent before Kwale court. That notice of the withdraw or discontinuous had the effect of terminating this appeal. The appeal having terminated it cannot in my humble view be reinstated or resuscitated. On that ground the appellant's Notice of Motion is unmerited and misconceived. It is dismissed with costs to the respondent.

Dated and delivered at Mombasa this 25th day of 2015.

MARY KASANGO

JUDGE

25.6.2015

Coram

Before Justice Mary Kasango

C/Assistant- Kavuku

For Appellant:

For Respondent:

The Ruling was delivered in their presence/Absence in open court.

MARY KASANGO

JUDGE